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No. 94-97

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER,

Petitioner,

V.

WILLIAM EVANS-SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO MOTION TO FILE AND BRIEF AMICUS CURIAE

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REASONS FOR DENYING THE MOTION AND ARGUMENT

I. THE *JACKSON v. VIRGINIA* STANDARD IS CLEAR AND WAS PROPERLY APPLIED BY THE COURT OF APPEALS.

The Amicus' fundamental objection to the decision below is simply that it does not agree with the result. The Amicus cites the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979) that the habeas court is to consider *all the evidence* in the light most favorable to the Commonwealth, but in fact it urges upon the Court only the latter part of that principle. Like Petitioner, the Amicus would interpret Jackson to require the habeas court to consider only selective portions of the Commonwealth's evidence. Both Petitioner and the Amicus seek a rule that the habeas court should ignore uncontradicted evidence produced by the Commonwealth's own witnesses in analyzing

the sufficiency of the evidence. Both because it is contrary to the intent of Jackson and would defy all logic, the Court of Appeals refused to adopt such a standard. (28A n.29).

The Amicus makes much of Evans-Smith's alleged "lies." It requires a formidable stretch, however, to compare Evans-Smith's alleged misstatements with the testimony of the petitioner in Wright v. West, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), as the Amicus attempts to do. In Wright, the defendant was found in possession of "over 15 of the items stolen" in a single home burglary, a mere two to four weeks after the crime. 120 L.Ed.2d at 240. Of course, that fact was critical, since it tied him directly to the crime. His explanation, which was thus equally critical, was incomplete and internally inconsistent. 120 L.Ed.2d at 231

& n.1. Thus, the jury was "entitled to disbelieve West's uncorroborated and confused testimony...." (Cites omitted). 120 L.Ed.2d at 241. The factual question for the jury, therefore, was whether, in light of West's prior felony conviction, his testimony plausibly explained his possession of a large number of items taken in a single burglary or, by its implausibility and confusion, simply provided more evidence of guilt. Id.

By contrast, the alleged "lie" of Evans-Smith discussed by the Amicus was an inconsistent statement concerning from which window his wife waved when he departed for work. Amidst the numerous facts as to which Evans-Smith provided information to the police during several interviews, this was indeed a terribly

minor point.[1] It stands in sharp contrast to West's pervasively inconsistent testimony as to the most basic factual issue in his case: why was he in possession of this cache of stolen goods?[2]

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[1]In addition, unlike West, Colonel Evans-Smith had no prior felony conviction.

[2]The Amicus references other contradictory statements, some of which he states, without explanation, "must certainly be false." *Brief Amicus Curiae*, p.5. The Court of Appeals addressed those statements in detail.

The Amicus also perpetuates the myth that Respondent "attempt[ed] to get a co-worker to change his story about defendant's arrival time at work." *Brief Amicus Curiae*, p.2. As the Court of Appeals noted, no such attempt was made. (25A).

The Amicus raises the jewelry box discovered in the field. *Brief Amicus Curiae*, p.2. The trial court noted that the box "showed remarkably little wear after being recovered approximately two weeks after the offense." (A39). It is entirely unclear why a jewelry box would "wear" sitting in a field for *two weeks*; on its face, the suggestion that such "wear" should be observable after such a brief period is inexplicable. There is no suggestion that the box was not dirty, nor was there any testimony as to what "wear"

The significance of many of the items to which the Amicus does point as subjective indicia of guilt remains elusive. For example, he points to Evans-Smith's "demeanor" and the "unusual questions" he asked when informed of his wife's death. *Brief Amicus Curiae*, p.2. Neither Petitioner nor the Amicus have suggested what factual basis existed by which the jury could determine that his demeanor was inculpating, or what was "unusual," and thus, presumably, inculpating, about the questions he asked. Rather, both argue for the proposition that a jury is free to speculate as to the significance of such subjective evidence, even in the absence of evidence that his

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one would expect given the moisture, mineral or acid content of the soil and the composition (plastic) of the box. The trial judge's comment is thus factually baseless.

alleged demeanor,[3] or the questions he asked, were unusual *for him*.

To be at all probative, such evidence must relate to the defendant's own personality or background. Thus, for example, questions concerning the crime scene might be unusual coming from a housewife, but not from a suspect trained in crime scene investigation. Similarly, the demeanor of a psychologist when advised of his spouse's death might be very different than that of, say, a Special Forces Colonel under similar circumstances. Nor is there even any reason to believe that all psychologists or all military officers would respond in the same manner.

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[3]Here, unlike in West, the jury had no opportunity to observe the defendant's demeanor *while testifying*. The Amicus has demonstrated remarkable restraint in not citing Evans-Smith's failure to testify as evidence of guilt.

The Commonwealth made no attempt to demonstrate that Evans-Smith's demeanor, or the questions he asked, were unusual *for him*.

The Amicus suggests that, somehow, the jury's observations of Evans-Smith during the trial would have enabled it to assess his lack of tears, which, according to the Amicus, "rais[ed] an inference that his grief was feigned."[4] *Brief Amicus Curiae*,

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[4]The Commonwealth, for example, could have introduced evidence that Colonel Evans-Smith tended to wear his emotions on his sleeve or even that someone had seen him cry in the face of death. Given Evans-Smith's Special Forces background, it is hardly surprising that the Commonwealth could not produce such evidence. However, its inability to do so does not provide the jury or state courts license to speculate as to the vagaries of human conduct. This is but one instance among several (e.g., the Commonwealth's failure to prove how long it took Evans-Smith to drive to work during rush hour, or to prove when he arrived at work) in which the Amicus and Petitioner rely on the absence of evidence to support the finding of guilt, and invoke

p.10 n.3. In the final analysis, it would prefer to let the jury simply guess as to what is unusual for Evans-Smith. Such speculation, however, has no part in the criminal justice system. *E.g.*, People v. Smith, 565 N.E.2d 900, 908-09 (Ill. 1991) (prosecutor may not argue inferences not supported by evidence). This Court should reject the concept of guilt by jury speculation, which is urged upon it.

The Amicus simplifies this Court's decision in Estelle v. McGuire, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) beyond recognition, quoting language to the effect that the evidence there was probative because it "narrowed the class of possible perpetrators to McGuire and his wife." *Brief Amicus Curiae*, p.6, *quoting*, McGuire,

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the talisman "inference" to disguise that lack of *evidence*.

116 L.Ed.2d at 400. In fact, McGuire demonstrates the weakness of the evidence cited here.

In McGuire, this Court noted that the purpose of the contested evidence was not to identify the perpetrator, but to establish that the injuries suffered by the child were not accidental.

> ...[E]vidence demonstrating battered child syndrome helps to prove that the child died at the hands of another ...; it also tends to establish that the "other," *whoever it may be*, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries. (Cites omitted) (Emphasis added).

116 L.Ed.2d at 396. The evidence, therefore, was relevant because it helped prove that the child did not die accidentally. 116 L.Ed.2d at 396-97.

In upholding the jury instruction in that case, this Court did make the observation noted by the Amicus. However, the Amicus omits any reference to the substantial additional evidence which established the nexus between McGuire and the "intentional act," evidence which did not merely narrow the class to McGuire and his wife, but to McGuire alone. 116 L.Ed.2d at 400. Under the jury instructions, the battered child syndrome evidence was relevant to the question of guilt only *after* the jury had found that McGuire had committed those other acts.

Here, on the other hand, the Amicus argues that the jury should have been able to consider, and the federal courts were compelled to consider, evidence as to which no such nexus was established, based upon the speculative answer to the inquiry

"[w]ith whom is a married woman, with no children at home, *likely* to argue at six in the morning?"[5] (Emphasis added). *Brief Amicus Curiae*, p.6. Contrary to the rationale in McGuire, the Amicus would allow identification of the perpetrator to be based on evidence *not* independently tied to the defendant. The suggestion that the evidence here was "similarly probative" (*id.*) to that in McGuire is thus absurd and the analogy fails miserably.[6]

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[5]The Amicus invokes "six in the morning" as if that was the proven time of death -- it was not. As Respondent has demonstrated, the time of death could have been as late as 8:00. *Brief in Opposition*, pp. 20-21. Thus, the speculative question it posits is itself based on its further speculation that (1) the killing must have been the result of an argument and (2) the time of death was at "six in the morning."

[6]The evidence here is so weak that the Amicus is forced to fill in the blanks with a statistical compilation as to motives for murder. *Brief Amicus Curiae*, p.6.

The factual analyses of both Petitioner and the Amicus are replete with assumptions and inferences of guilt based upon the *absence* of evidence. It is thus abject speculation to which the Amicus would ask the federal courts to defer.

II. THE DOCTRINE OF NONRETROACTIVITY IS NOT IMPLICATED BY THE DECISION BELOW.

The argument advanced by both the Amicus and Petitioner is predicated on the notion that the government's burden to prove guilt beyond a reasonable doubt, a standard which, incidentally, goes without mention by the Amicus, is met even where it requires the court to ignore the prosecution's own evidence. It is that reworking of Jackson, rather than the Court of Appeals' consideration of all the Commonwealth's evidence, that seeks a "new rule."

As Respondent has discussed this issue in his Brief In Opposition, and the Amicus has added little to the debate beyond cute phrasemaking, Respondent does not address the question further here.

III. THIS CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RECONSIDERATION OF ESTABLISHED PRINCIPLES OF LAW SIMPLY BECAUSE THE AMICUS WISHES TO EVISCERATE FEDERAL HABEAS CORPUS.

The Amicus seeks to use this case to promote its own agenda: the elimination of meaningful habeas corpus review. This case is in no sense unique for that purpose, but, as with any successful Jackson claim, it provides a convenient vehicle for that agenda.

While paying lip service to the value of federal habeas review, the Amicus would plainly not be disappointed by its demise. It makes the incredible suggestion that federal review under Jackson should give

way to what is *not* in the record, that the federal courts should show deference to the trial judge's opportunity to observe non-evidence, *to wit*, Evans-Smith's demeanor at trial, *Brief Amicus Curiae*, p.10 n.3, even in the absence of any reference to that by the trial court.[7] Thus, the Amicus' respect for habeas corpus would extend no further than an inquiry as to what the trial court might have observed which is not of record. Its protestations as to the importance of habeas review certainly can not be taken seriously. The last thing it

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[7]While the Amicus argues that deference is due the trial judge's findings because he observed the proceedings, *Brief Amicus Curiae*, p.10, it also argues that deference is due as to matters which the trial judge observed but made no reference. *Id.*, n.3. At a minimum, consistency would demand that the judge's silence as to such a circumstance be treated as an implication that it was not a factor suggesting guilt.

wants this Court to do is "put some meat on Jackson's bones." *Id.*, p.4. It would plainly prefer to strip it bare.

Federal habeas corpus remains an essential safeguard because not all state courts are committed to the enforcement of constitutional rights. *See*, Giarratano v. Murray, 492 U.S. 1, 23-24 (1989) (Stevens, J. dissenting) (federal habeas relief granted in 60% to 70% of capital cases). In Virginia itself, only one capital habeas petitioner has been granted relief, and then only because the Commonwealth conceded error.[8] The Virginia Supreme Court has granted review as to only two such cases,[9]

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[8] Evans v. Johnson, (Alexandria Cir. Ct., 5/14/85).

[9] Review by the Virginia Supreme Court, other than the direct appeal of death verdicts, is obtained by writ of error, the denial of which is a decision on the merits. Saunders v. Reynolds, 214 Va. 697,

affirming the *denial* of relief in one, Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981), and reversing the *granting* of relief in the other. Virginia Dep't of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984).[10] Thus, in only one case out of more than fifty has any such petitioner obtained relief from the Virginia courts.[11] This result should surprise no one, given that, even 23 years ago, the Virginia Supreme Court could not actually give a merits review to each case presented, a circumstance which clearly applied to the consideration of habeas

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700-01, 204 S.E.2d 421 (1974).

[10]Clark ultimately obtained relief in federal court.

[11]As Justice Stevens noted in Giarratano, the success rate in non-capital habeas cases tends to be dramatically lower than in capital ones, even in federal court. 492 U.S. at 23-24.

corpus petitions. Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis In Virginia?*, 57 Va. L.Rev. 3, 6-8, 14-16 (1971).[12]

By way of example, this Court remanded the case of Tuggle v. Virginia, 471 U.S. 1096 (1985) for reconsideration in light of Ake v. Oklahoma, 470 U.S. 68 (1985). The Virginia Supreme Court reaffirmed, *even though the Commonwealth conceded Tuggle was entitled to a new sentencing hearing.* Tuggle v. Commonwealth, 230 Va. 99, 384 S.E.2d 838 (1985). Tuggle's state habeas corpus petition was dismissed, which was affirmed by the Virginia Supreme Court. *See*, Tuggle v. Bair, 112 S.Ct. 1681 (1992).

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[12] As was properly suggested there, "no man's ... liberty should be disposed of by unappealable determination of a single individual ...," the consequence of a discretionary review system, even if it is disguised as a merits review. Id. at 16.

Tuggle's *federal* habeas corpus petition was then granted on six separate constitutional grounds, including the Ake issue and the denial of a right to a fair trial, Tuggle v. Thompson, 854 F.Supp. 1229 (W.D.Va. 1994), fundamental errors to which the Virginia courts had turned a deaf ear. Thus, the suggestion that "changes in the nation" have "rendered relitigation far less necessary and much more evil" is indefensible, even beyond its fantastic premise that effective habeas corpus review was necessary only because of "racial discrimination cases from the South in 1953" and that race discrimination, in the South or elsewhere, has been effectively addressed by our judicial system.[13]

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[13]Claims under Batson v. Kentucky, 476 U.S. 79 (1986) provide an obvious barometer of a court's commitment to enforcing race-based constitutional rights in criminal

Respondent is at a disadvantage, because the Amicus references arguments contained in a brief not filed in this

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cases. The Virginia Supreme Court has rejected every Batson claim it has considered. In fact, it has summarily rejected all but one such claim, James v. Commonwealth, 247 Va. 459, 463, 442 S.E.2d 396 (1994), its other six published decisions coming in death penalty cases, where review is mandatory. *See*, Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987); Townes v. Commonwealth, 234 Va. 307 362 S.E.2d 650 (1987); Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989); Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196 (1991). The Court's failure to even review more than one such case in the eight years since Batson demonstrates extraordinary indifference to race discrimination in the criminal justice system. In the one case in which it did grant a writ of error, the Court accepted the prosecutor's *religiously* discriminatory justification for his racially discriminatory strike. James, *supra*. Are we actually to conclude from this that the Virginia courts are to be trusted with the enforcement of federally protected rights? *See*, James, 247 Va. at 464, 442 S.E.2d at 399 (Hassell, J. dissenting). If "race discrimination in the South" did provide the impetus for the *de novo* standard of review, in Virginia at least, a new day has not yet dawned.

case. *See, Brief Amicus Curiae*, p. 13. However, Justice O'Connor thoroughly addressed this identical argument in Wright v. West, 120 L.Ed.2d at 242-46. Most relevant to the instant case, Justice O'Connor pointed out that this Court specifically rejected use of a deferential standard in Jackson itself. 120 L.Ed.2d at 246, *citing*, Jackson, 443 U.S. at 323, 324. Respondent, therefore, defers to Justice O'Connor's exposition on the subject.

CONCLUSION

For the foregoing reasons, the Motion and Petition should be denied.

Respectfully submitted,

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